

REPORT to the KITTERY TOWN COUNCIL - TITLE 15-16 - ORC - 09/08/11

RESPONSIBLE INDIVIDUALS: Ordinance Review Committee

Date: 09/12/11

Subject: Title 16 - Nonconformance - Board of Appeals Authority

Background:

- Board of Appeals input to Planning Board and staff recommended revision to nonconformance standards (*encl 1*)
- BoA Secretary Wilson explanation of need and request for emergency ordainment (*encl 3*)
- Public hearing conducted by Council on 08/22/11

Current Situation:

- Recommendations were approved by Planning Board on July 28, 2011
- Emergency ordainment - Town Charter:

"Sec. 2.15. Emergency ordinances.

To meet a public emergency affecting life, health, property or the public peace, the council may adopt one or more emergency ordinances in the form and manner prescribed for ordinances generally, but such emergency ordinances may not levy taxes or authorize the borrowing of money except as provided in section 6.10, subsection 2. An emergency ordinance may be adopted with or without amendment or rejected, but the affirmative vote of at least 5 members shall be required for adoption. It shall become effective upon adoption or at such later time as it may specify."

- Retroactive ordainment - Law Court Case Law:

"Petrucelli, Martin & Haddow, LLP

In 1988, the Maine Law Court held that a municipal ordinance may contain a legally binding provision making the ordinance retroactive; i.e., effective on the date that it is proposed rather than on the date that it is enacted, overriding the statutory rule of prospective application of ordinances and statutes found in 1 MRS §302. City of Portland et al v. Fishermen's Wharf Associates II, 541 A.2d 160 (Me. 1988). For more than fifteen years, most land use lawyers believed that the retroactivity rule could not be used to force the denial of a land use application that had undergone substantial review before an adverse ordinance change was enacted. In 2004, the Law Court spoke again on the subject, this time making it clear that the land use lawyers had it wrong: a municipality could defeat a land use application by enacting a retroactive ordinance after the application had been under review by the appropriate municipal authorities (in this case, the planning board) for several months.

Kittery Retail Ventures, LLC v. Town of Kittery, 2004 ME 65, 856 A.2d 1183 (cert. den. 544 U.S. 906). In fact, a municipal land use ordinance amendment could be made effective on a date even earlier than the date on which the amendment was originally proposed, even if it required the denial of an application whose review was well under way before the change was proposed. Id."

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- Purpose, findings, and intent are shown in front matter of proposal (*encl 1*)
- Revision proposals are in the proper form and format for passage.

Recommendation: Council consideration for ordainment

Enclosures:

1. Title16 Nonconformance Enact
2. Title 16 Nonconformance Amendments
3. BoA Secretary Explanation (e-mail)